IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

THURSDAY, THE 15TH FEBRUARY 2007 / 26TH MAGHA 1928

WP(C).No. 29409 of 2005(A)

PETITIONER:

THE FACT MANAGERIAL STAFF HOUSE
CONSTRUCTION CO-OPERATIVE SOCIETY,
LTD.NO.E.243, SANTHINAGAR ANNEXE,
RAJAGIRI.P.O., SOUTH KALAMASSERY-683 104,
REP. BY ITS SECRETARY, M.K.PARAMESWARANKUTTY
MENON.

BY ADV. SRI.P.SANTHALINGAM
SRI.S.SHARAN

RESPONDENTS:

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1. STATE OF KERALA,
REP. BY SECRETARY TO GOVERNMENT,
CO-OPERATIVE DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM.

2. REGISTRAR OF CO-OP. SOCIETIES,
O/O.THE REGISTRAR OF CO-OPERATIVE
SOCIETIES, THIRUVANANTHAPURAM.

3. JOINT REGISTRAR OF CO-OPERATIVE
SOCIETIES (GENERAL), ERNAKULAM.

ADDL 4. PAUL P.K., S/O.P.O.KUNJUVAREED, AGED 42 YEARS,
PAREKADON HOUSE, KORATTY EAST PO., TRICHUR.

ADDL. 5. T.J.SUNNY, S/O.T.P.JOSEPH, AGED 32 YEARS, RESIDING AT THANNIKOT HOUSE, KUMBALAM PO., KOCHI-682506.

ADDL.RESPONDENTS 4 AND 5 IMPLEADED AS PER ORDER IN I.A.NO.17336/05 DT.12.12.05

R1 TO R3 BY GOVT.PLEADER SRI.MATHEW G.VADAKKEL
ADDL.R4 & R5 BY SR.ADV. SRI.L.NAGESWARA RAO
ADV.SRI.TOM JOSE

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 15/02/2007, ALONG WITH WPC NO. 34130 OF 2005 & WPC NO. 31927 OF 2005, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

PIUS C. KURIAKOSE, J.

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W.P.(C) No.29409, 31927 & 34130 OF 2005

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DATED THIS THE 15th FEBRUARY, 2007

J U D G M E N T

W.P.(C)No.29409 of 2005 has been filed by the FACT Managerial Staff House Construction Co-operative Society, arraying the State, the Registrar of Co-operative Societies and the Joint Registrar of Co-operative Societies (General), Ernakulam as respondents 1 to 3, seeking a writ of certiorari to quash Ext.P13 order dated 10.8.2005 of the 3rd respondent-Joint Registrar appointing an enquiry officer for the conduct of enquiry under Section 68(1) of the Kerala Co-operative Societies Act (hereinafter referred to for short as 'the Act') on the basis of the report of an enquiry under Section 65 of the Act.

2. W.P.(C)No.34130 of 2005 is filed by the Secretary of FACT Ministerial Staff Housing Co-operative Society New Housing Colony Members' Association arraying as many as 12 respondents. The 1st respondent is the State; 2nd, 3rd and 4th respondents are the Registrar of Co-operative Societies, the Joint Registrar of Co-operative Societies and the Unit Inspector in the Office of the Assistant Registrar of Co-operative Societies; 5th respondent is the Society itself; 6th respondent is a sick industrial company by name Sudarsan Clay and Ceramics Ltd. whose scheme for revival is said to be pending before the BIFR; the

10th respondent is a concern by name Safe Care Associates and it is stated that as authorised by the BIFR, the 6th respondent has executed an agreement of understanding with the 10th respondent for sale of 15 acres of land belonging to the 6th respondent in favour of the 10th respondent. But that agreement was terminated since the 10th respondent could not pay the second instalment of advance amount as promised. Thereafter, after complying with the legal formalities, a pucca agreement for sale was executed in respect of that property with the 5th respondent-Society which paid a sum of Rs.2 Crores towards advance consideration. It is also stated that in furtherance to the agreement of sale, an extent of 2.60 acres stands already conveyed to the Society. The 9th respondent is the Chief Executive Officer of the 10th respondent; 7th and 8th respondents are described as benami agents set up with ulterior motives and it is stated that they are close associates of the 10th respondent; 11th and 12 respondents are respectively the Branch Managers of the Federal Bank in its Banerji Road Branch and Panampilly Nagar Branch. The Writ Petition has been instituted for a writ of certiorari to quash Ext.P5 enquiry report submitted by the 4th respondent (the enquiry report under Section 65 of the Act) to the 3rd respondent and to direct the 1st respondent to

conduct an enquiry against the conduct of respondents 3 and 4. There is also a prayer that the proceedings initiated by respondents 3 and 4 against the 5th respondent are without jurisdiction and are vitiated by patent illegalities.

3. W.P.(C)No.31927 of 2005 has been filed by one P.K.Paul and T.J.Sunny (respondents 7 and 8 in W.P.(C)No.34130 of 2005) arraying the State, the Registrar of Co-operative Societies, the Joint Registrar of Co-operative Societies and the Assistant Registrar of Co-operative Societies as respondents 1 to 4. The 5th respondent is the Society itself and the 6th respondent is Sudarsan Clay and Ceramics Ltd. The de facto petitioner in W.P.(C)No.34130 of 2005 has been impleaded subsequently as additional 7th respondent. The prayers in this Writ Petition are for a writ of mandamus commanding respondents 1 to 4 to take urgent and necessary action including surcharge proceedings against the 5th respondent, after removing the present Director Board from the administration of the 5th respondent-Society and hand over the same to an administrator in the light of Ext.P10 enquiry report (the report under Section 65 of the Act relied on in Ext.P13 impugned in W.P.(C)No.29409 of 2005) and for a writ of mandamus commanding respondents to refund the advance amounts collected in full vide

Ext.P1 circular published by the 5th respondent-Society in the context of application for membership and application for allotment of plots within a time frame and the balance amounts be ordered to be recovered from the office-bearers of the 5th respondent-Society in the light of Ext.P10 enquiry report. The other prayers in the Writ Petition are for a direction to the 5th respondent-Society to compensate the petitioners for the loss sustained by them towards legal expenses incurred on account of various proceedings initiated leading to Ext.P10 and for a direction to respondents 1 to 4 to take follow-up action on the basis of Ext.P10 report.

4. I shall refer to the facts as stated by the petitioner in W.P.(C) No.29409 of 2005, the FACT Managerial Staff House Construction Co-operative Society (hereinafter referred to as 'the Society'). The Society is a renowned Housing Society which had already set up 4 housing colonies in Kalamassery area. It was late M.K.K.Nair IAS, the first Chairman and M.D. of FACT who took the initiative for starting the Society and he was the first member of the society. It is stated that the Society took steps following normal proceedings for the commencement of a new housing colony. Ext.P1 produced in the Writ Petition is true copy of the annual report of the Society for the year

2000-01 approved by the Director Board on 13.2.2002 which shows that the Society was planning to have a new housing colony and that the General Body approved the report. Ext.P2 is the true copy of decision No.7 dated 3.6.2004 taken by the Society. This will show that further action for commencement of the new housing colony is being taken. The move gained momentum by 2004 and that was why Ext.P2 decision was taken by the Board of Directors of the Society to purchase 15 acres of land belonging to M/s.Sudarsan Clay and Ceramics Ltd. (the 6th respondent in W.P.(C)34130 of 2005) which will hereinafter be referred to as SCCL. SCCL was referred to BIFR vide case No.173/89 and BIFR by its order dated 15.10.2003 permitted SCCL to sell 15 acres of land to clear the outstanding liabilities so that the Company may be able to revive. SCCL entered into an agreement dated 30.12.2003 with M/s.Safe Care Associates (10th respondent in W.P.(C)No.34130 of 2005) (hereinafter referred to as 'SCA'), a real estate partnership firm for the sale of land at the rate of Rs.24,000/- per cent. After paying some advance money, SCA failed to pay the balance consideration within the stipulated time. While trying to get a new purchaser, SCCL, as requested by SCA, extended the time for final payment by one month. But SCA could not pay the balance

consideration which led to cancellation of the agreement by written communication dated 7.6.2006. Thereafter, negotiations for sale of the land to the Society took place. Ext.P3 dated 16.6.2004 is copy of letter issued by SCCL to the Society. Ext.P3 will show that there is acceptance of the offer of purchase of land from SCCL.. Ext.P4 dated 15.6.2004 is copy of decision No.2 of the Board of Directors of the Society which will show that decision was taken for starting a new housing colony in a transparent manner. Ext.P5 is copy of Circular No.New HC/FMS/01/04 dated 17.6.2004 issued by the Society. This circular gives the details of the proposal for new housing colony and the requirements of paying advance amounts towards purchase and development of the land and all allied matters. Ext.P6 is copy of agreement dated 7.7.2004 for purchase of land entered into between SCCL and the Society. Ext.P6 will show that a sum of Rs.2 Crores was paid by the Society as advance. Pursuant to Ext.P6, an extent of 2.60 acres of land was conveyed to the Society and Ext.P7 is copy of sale deed dated 14.7.2004. The Society alleges that P.K.Paul and T.J.Sunny (petitioners in W.P.(C)No.31927 of 2005) approached the Society pretending to be interested to become members of the Society and to book house plots. They submitted applications for membership

and letters requesting for reservation of house plots in the proposed colony. Cheques drawn on the Federal Bank for Rs.4.35 lakhs and Rs.3 lakhs were also handed over. But when these crossed cheques were presented for collection, both the cheques were returned with the remark that stop memos had been issued by the drawers Paul and Sunny. The meeting of the Board of Directors of the Society held on 1.7.2004 considered the membership application of Sri.Paul and decided to refuse membership and the decision was communicated to him by letter dated 26.7.2004. Similarly, membership application submitted by Sri.T.J.Sunny was also rejected on the same day and he was also informed regarding the said decision by letter dated 26.7.2004. It is stated that neither of them have so far questioned the decision of the Society to reject membership to them, a decision which was taken in accordance with Clause 7 of the byelaws of the Society. The Society refers to Exts.P2 and P3 documents produced in W.P.(C)No.34130 of 2005 (copies respectively of the complaint submitted by SCA and the partnership deed pertaining to SCA) to contend that Paul and Sunny are agents or employees of SCA which is a real estate firm. The petitioner-Society contends that after termination of the agreement for sale which SCA was previously

having with SCA, SCA have no right at all to question the agreement dated 7.7.2004 entered into between the Society and the SCCL. But typical of the modus operandi of the land mafia in Kerala, SCA, it is alleged, took several coercive steps for blocking implementation of the petitioner's agreement with SCCL. A false complaint was submitted by Mr.Paul and Mr.Sunny at the behest of SCA against the Society before the Co-operative Department. Ext.P2 document produced in W.P.(C) No.31927 of 2005 is copy of the complaint submitted by them on 28.6.2004 before the Joint Registrar of Co-operative Societies, Ernakulam and the Assistant Registrar. Without even giving a few days' time to the Joint Registrar for enquiring into the complaint, they filed W.P.(C)No.19511 of 2004 before this Court, levelling what is described as false and wild allegations against the Society. W.P.(C) No.19511 of 2004 which was filed on 30.6.2004 was disposed of on 2.7.2004 without notice to the Society at the admission stage itself. Ext.P3 produced in W.P.(C)No. 31927 of 2005 is copy of that judgment. Under Ext.P3 this Court directed the Joint Registrar to ensure that appropriate follow up actions are initiated within a period of 14 days of receiving a copy of the judgment, however cautioning that principles of natural justice should be complied with. SCA filed

O.S.252 of 2004 before the Subordinate Judge's Court, North Paravur and obtained an interim injunction against the Society and the SCCL. Thus, the implementation of the agreement dated 7.7.2004 between the Society and SCCL was blocked. Ext.P8 produced by the petitioner is copy of order No.HM/3793/04 dated 10.9.2004 issued by the 3rd respondent to the petitioner. Under Ext.P8 the entire land transaction is stayed by the Joint Registrar of Co-operative Societies (General). The petitioner-Society contends that but for Ext.P8 order and the injunction order passed by the civil court, the entire land transaction could have been completed within the fixed time itself. The second instalment of Rs.1.50 Crores was already deposited with the State Bank of India and payment and execution of sale deed as per the terms of the agreement could have been easily done before 7.8.2004 itself as per the terms of the agreement. Ext.P9 produced by the petitioner-Society is copy of order No.HM/3793/04 dated 30.9.2004 issued by the 3rd respondent. Under Ext.P9, an enquiry under Section 65 of the Act is ordered on the basis of the complaint submitted by Sri.P.K.Paul and T.J.Sunni. The petitioner contends that Sri.Paul and Sri.Sunny were two strangers. Their application for membership having been rejected by the Board of Directors of the Society and that

order of rejection having attained finality, the new Joint Registrar has passed Ext.P9 without bothering to hear the petitioner on the real facts and has acted hastily. The Society filed W.P.(C)No.29482 of 2004 before this Court impugning Ext.P9. That Writ Petition and W.P.(C) 27807 of 2004 filed by Sri.P.K.Paul and Sri.T.J.Sunny were disposed of by a Division Bench by a common judgment. Ext.P10 is copy of that common judgment. Under Ext.P10, the Division Bench agreed with the contention of the Society that the Joint Registrar cannot pass an interim order though he is empowered to conduct an enquiry and in the circumstances of the case Ext.P9 order was set aside. Enquiry was allowed to be continued and it was ordered that petitioners in both the Writ Petitions should be given notice and the Society should be permitted to take whatever defence it wants to. The Society and the impleaded parties were permitted to plead non-maintainability of the petitions. The Joint Registrar was directed to pass orders finally after considering all the objections and the files placed by the parties. The petitioner-Society states that its Managing Committee members were asked to attend a hearing in connection with the enquiry in April, 2005 before the Unit Inspector of Co-operative Societies, Maradu. On coming to understand that the Unit Inspector has submitted a report to

the 3rd respondent, the Society requested for a copy of that report from the 3rd respondent. Ext.P11 is copy of that request. The Society submits that till date no reply has been received by the Society. Even the copy of the enquiry report was not furnished to the Society for months. The contesting parties in Ext.P10 judgment preferred SLP before the Supreme Court of India and obtained Ext.P12 order directing that the disputed properties shall not be sold until further orders. The 3rd respondent-Joint Registrar has, on 10.8.2005, relying on the report of the enquiry officer ordered that surcharge proceedings must be initiated against the members of the Managing Committee under Section 68 of the Co-operative Societies Act, accepting the finding in the report that the land purchase deal was vitiated by illegalities and resulted in loss to the Society. Ext.P13 is copy of that order. Ext.P14 is copy of the enquiry report dated 25.4.2005 which was received by the petitioners only during the first week of November, 2005. The petitioner contends that the particulars mentioned in the report are totally incorrect and that such a report has been filed only on mala fide considerations. They claim that they have already disproved each and every allegation contained in Ext.P14 and that the motive behind raising the very same allegations

again is to squeeze and ruin a housing society and thereby promote the interests of a real estate group. It is contended that the conclusions in Ext.P14 are perverse and that such conclusions have been entered only with the objective of helping the business venture of M/s.Safe Care Associates. Impugning Exts.P13 and P14 on various grounds, the petitioner prays in W.P.(C) No.29409/2005 that Ext.P13 be quashed and it be declared that no proceedings can be initiated against the petitioner under Section 68 of the Co-operative Societies Act.

5. As already indicated, W.P.(C) No.34130/2005 is field by an association of the members of the Society and the prayers in that writ petition are to quash the enquiry report and also for a declaration that the proceedings initiated by the Joint Registrar and by the Unit Inspector against the Society are vitiated by patent mala fides and thereby protect the interests of the members of the petitioner-association who have already advanced about Rs.3.8 Crores towards cost of 15 acres of land. W.P.(C) No.31927/2005 is filed by Sri.P.K.Paul and T.J.Sunny seeking a writ of mandamus directing respondents 1 to 4 in that writ petition, viz., the State of Kerala, the Registrar, the Joint Registrar and the Assistant Registrar, to take

urgent and immediate action including surcharge proceedings against the Society after removing the present Director Board from the administration and hand over the same to an administrator in the light of the enquiry report. Further prayer in that writ petition is that the Society be directed to refund advance amount collected in full and grant interest on the same in a time-bound manner and the deficiency in the payment of the principal amount with interest be ordered to be recovered from the office bearers of the Society who are signatories to the circular. There is yet another prayer to direct the Society to compensate the loss sustained by the petitioners by way of legal expenses.

6. No counter affidavit is seen filed by any of the respondents in W.P.(C) No.29409/2005. But in W.P.(C) No.34130/2005 Sri.P.K.Paul and T.J.Sunny have filed a counter affidavit to the additional affidavit dated 19.10.2006 filed by the writ petitioner. Through that counter affidavit they answer the averments in the writ petition particularly the allegations which are directed against them. Ext.R7(a), a copy of the account statement relating to the account maintained by Sri.P.K.Paul, is relied on. Excerpt from the enquiry report is relied on to contend that the Society had been adopting double standards in the

matter of giving membership to persons residing outside the area of the Society. Ext.R7(b), a copy of the voters list, is also relied on to substantiate the contention that persons residing outside the area of the operation of the Society have been given membership while the membership has been denied to the 7th and 8th respondents. It is stated that the Writ Appeal preferred by Sri.P.K.Paul and Sri.T.J.Sunny against the common interim order passed by this court in I.A. No.428/2006 in W.P.(C) No.31927/2005 was jointly considered with I.A. No.1073/2006 in W.P.(C) No.34130/2005. It is contended that the petitioner has suppressed the fact that the Division Bench had left open the right of respondents 7 and 8, the appellants in the writ appeal to raise the grounds raised in the writ appeal in the writ petition itself which was pending. This counter affidavit proceeds to justify the enquiry report and the surcharge proceedings proposed under Section 68 of the Act. The signatory to the writ petition is described as a proxy of the Society.

7. In W.P.(C) No.31927/2005, the Society has filed a detailed counter affidavit denying the allegations and refuting the grounds. The 6th respondent in that case, viz. SCCL, has filed a counter affidavit through Sri.T.P.Muralidharan,its Director. It is contended therein that

even though no reliefs are claimed against the 6th respondent, the counter affidavit has been filed only for clarifying the stand of the 6th respondent company regarding the agreement for sale which was entered into with the Society. Inter alia it is contended that the 6th respondent on becoming a sick industrial undertaking as defined in the Sick Industrial Companies (Special Provisions) Act 1985 made a reference to the BIFR, pursuant to which case No.173/89 was registered and enquiry as contemplated in the said Act was ordered. Under the orders of the BIFR, the operating agency prepared a scheme for the rehabilitation of the company and was approved by the BIFR on 25.1.2002. This scheme inter alia provided for disposal of 5 acres of land belonging to the company for settlement of its liability. However, as the funds so generated would not have been sufficient for liquidating the liability, a modified scheme was prepared and was approved by the BIFR on 15.10.2003 which among others, permitted disposal of 15 acres of land belonging to the company. Pursuant to that, tenders were invited and the offer made by Safe Care Associates (SCA) Cochin being the highest bidder was accepted by the company and the same was approved by the BIFR. But agreement for sale executed between SCA and SCCL, due to reasons

attributable to the purchaser, had to be terminated. Therefore, the offer made by the Society was accepted by the company and an agreement for sale subject to approval by the BIFR was entered into on 7.7.2004. Under this agreement the Society was to complete the transaction within 6 months, i.e., on or before 6.1.2005. Apart from the fact that the Society itself had committed default of the terms agreed to by them, in the meanwhile, some of the members of the Society (reference is to Sri.P.K.Paul, Sri. T.J.Sunny and another person) had sought an investigation into the transactions of the Society itself. In the said proceedings, the Joint Registrar of the Co-operative Societies had passed a prohibitory order restraining the Society from proceeding with the transaction. They filed W.P.(C) No.19511/2004 in which Ext.P3 judgment directing expeditious follow up action was passed by this court. While so, by an order dated 25.9.2004, the BIFR recommended winding up of the Company in which it inter alia found fault with the Company for having entered into the agreement without its approval. Against the said order, both SCA and SCCL preferred appeal Nos. 221 and 238/2004 before the AAIFR and the AAIFR by its order dated 20.7.2005 set aside the order of the BIFR and directed reconsideration. In the meanwhile, on the expiry

of the agreement with the Society, the period of the same was extended by four months, i.e., till 5.5.2005. While the matters stood thus, the enquiry initiated under Section 65 of the Co-operative Societies Act was completed and Ext.P10 report was submitted. Counter affidavit contends that the 6th respondent cannot be faulted in any manner for having entered into the agreement for sale or for its non- performance. The non performance is due to reasons which are attributable only to the Society. It is pointed out that the Society filed O.S. No.618/2005 before the Sub Court, Ernakulam seeking specific performance of the agreement for sale and that the Sub Court dismissed that suit as not maintainable. Lastly, it is contended that the BIFR vide its proceedings dated 1.3.2006 directed the Company to cancel the agreement entered into with the Society and to refund the advance received along with reasonable amount of interest within a period of 60 days. Therefore, at present, there is no privity of contract between the company and the Society.

8. All these three cases were heard together. Sri.P.Santhalingam addressed me on behalf of the Society. Sri.D.Sreekumar addressed me on behalf of the petitioner in W.P.(C) No.34130/2005. The learned Government Pleader addressed me on

behalf of the official respondents. It was Sri.Tom Jose and Sri.Nageswar Rao, Senior Advocate who addressed me on behalf of the contesting respondents.

9. Sri.Santhalingam and Sri.Sreekumar referred in their submissions to Ext.P9 order and Ext.P14 report in W.P.(C) No.29409/2005, Ext.P6, Ext.P3 partnership deed, Ext.P2 Criminal Complaint and many other documents. Sri.Nageswar Rao, the learned Senior Counsel would refer to the enquiry report and submit that there is no warrant for interference in judicial review. The learned Senior counsel relied on in this context on the judgment of the Supreme Court in **State of Punjab v. V.K.Khanna and Others (2001) 2 SCC 330), B.P.Sugandhar Bishop in Medak v. D.Dorothy Dayasheela Ebeneser (1996) 4 Supreme Court Cases 406)** and also the decision in **Food Corpn. Of India Hyderabad and others v. A . Prahalada Rao and another (2001) 1 Supreme Court Cases 165**) . Sri.Shanthalingam and Sri.Sreekumar also did not lag behind in citing judicial precedents. They referred to a judgments reported in **A.K.Francis v. Joint Registrar (1990 (2) KLT 470) , Ranjit Singh v. Union of India and others (2006) 4 Supreme Court Cases 153) , Ellakkal Service Co-operative Bank v. State of Kerala**

(1997 (2) KlT 85) Gouthaman v. State of Kerala (1998 (1) KlT Short Notes page 17), Jose Kuttiyani and others v. The Registrar of Co-operative Societies, Kerala and others.(AIR 1982 Kerala 12), apart from referring to the judgment of the Supreme Court in **Pentakota Sriramulu v. Co-operative Marketing Society Ltd. (AIR 1965 Supreme Court 621)**.

10. I have considered the rival submissions addressed before me with reference to the provisions in the Co-operative Societies Act and the Rules and in the context of the law as laid down in the various judicial precedents which were cited at the Bar and the facts emerging from the pleadings and the various documents placed on record. The learned Senior Counsel is certainly right when he submits that the scope for judicial review in departmental enquiries is very narrow. But it cannot be denied that when violation of the statutory rules or principles of natural justice is involved, it is within the powers of the writ court to intervene even in those cases where the statutory remedies have not been exhausted. The position is fairly trite in view of the judgments of the Supreme Court in **Ram & Shyam Company v. State of Haryana and others (AIR 1985 AIR 1985 SC 1147), LIC of India v. Consumer Education & research Centre (1995 5**

SCC 482), James Koshy v. KSRTC (1999 (3) KLT 533), State of H.P. v. R.M.Pal (1999 (2) KLT short No 36) and All India Statutory Corporation v. United Labour Union (1997 (9) SCC 377).

11. The claim of the Society that its track record till it promulgated Ext.P1 Circular proposing the establishment of its 5th housing project was excellent was not seriously disputed before me. The case of the Society is that the enquiry officer appointed under Section 65 of the Act conducted an enquiry in a highly partisan manner. Crucial matters were twisted even misinterpreting the Act, the Rules and the bye- laws with the sole objective of finalising a report against the working of the very renowned society and a transparent land deal which was entered into by that Society ignoring its reputation and track record, so complains the Society.

12. On going through the enquiry report, I find that as many as seven short comings are found in the enquiry report against the Society.

13. The first one is that clause 35 of the Bye law of the Society and Section 54 of the Co-operative Societies Act were violated in the matter of land deal. Section 54 of the Co-operative Societies Act

provides that Sections 42 to 52 will prevail notwithstanding anything inconsistent contained in any other law for the time being in force. Significantly there is no allegation and much less a finding that any of the provisions contained in Sections 42 to 52 of the Act were violated. Clause 35 of the Bye-law of the Society reads as follows:

"Purchase of land and construction of houses:

> Subject to such resolution as the general body of members may from time to time pass, the Board Directors shall have full power to do all things which it may deem necessary or expedient for the accomplishment of all the objects specified in bye -law 2 , including powers to purchase , hold, sell,exchange, mortgage rent ,lease sub lease, surrender and accept surrenders of land or houses and to construct houses. "

14. It appears that the opening words of the above clause "subject to such resolution as the general body of members may from time to time pass" have been misinterpreted by the enquiry officer to mean that all transactions should have the approval through a resolution of the general body. It should not be forgotten that the Co-operative Society functions as an autonomous body and has its own freedom of activities which of course is to be exercised within and subject to the Act, Rules and Bye laws and directions of the Registrar. (see Gouthaman's case (supra). The correct interpretation of clause 35 of the bye laws, according to me, can only be that the full powers

of the Director Board is subject only to resolution or resolutions which may be passed by the general body. It is not at all disputed that all the earlier four housing colonies were successfully set up by the Society on the basis of decisions originated at the level of the Director Board. Exts.R7(c) and R7(d) in W.P.(C) No. 31927/2005 are resolutions passed unanimously by the general body meetings of the members of the Society and those resolutions would show that the members fully support and approve all actions and decisions taken by the Board of Directors in the land transaction in question. The Society has a contention that a copy of Ext.R7(c) was actually handed over to the enquiry officer, who for reasons best known to him has not adverted to the same at all.

15. The second shortcoming which is highlighted in the enquiry report is that no legal opinion was obtained by the Society before agreeing to purchase the land. Ext.P6 in W.P.(C) No.34130/2005 is dated 2.6.2004 and it is received by the Society atleast one day prior to Ext.P2 decision of the Board in W.P.(C) N.29409/2005 to go ahead with a starting of new housing colony. I find that Ext.P6 legal opinion is given by an experienced civil lawyer of the District Court Bar and that even as he has certified regarding the quality and marketability of

SCCL's title to the property he has insisted on obtainment of six documents before actual sale is executed. The case of the Society that the original of this legal opinion was actually perused by the enquiry officer and that the enquiry officer did take a copy of this legal opinion is not disputed before me. So the above shortcoming which is highlighted in the enquiry report is clearly contrary to facts.

16. The third shortcoming pointed out in the enquiry report is that the agreement for sale was executed only on 7.7.2004 and that even before executing the agreement advance amounts were recovered by the Society from various parties from 25.6.2004 on wards. The case of the Society in this context is that decision to collect the advance amount from prospective takers of plots was taken by the Board of Directors in accordance with the long standing practice, in the Society, a practice which is in vogue in other reputed housing Societies in the District and that amounts were received only after the acceptance of offer was confirmed by SCCL. The document which is produced as Ext.R7 (f) in W.P.(C) No. 31927/2005 will certainly support the claim of the Society that such a practice was in vogue at least in this Society and that it is the practice which was followed so far by the housing Society.

17. The fourth irregularity found in the report is that the Society has agreed to pay Rs.11,000/- more than what was agreed to by SCA and thereby a loss of Rs.11,000/- per cent was incurred. I find force in the submissions of Sri.Shanthalingam and Sri.Sreekumar that the enquiry Officer's report in this context was totally unrealistic and that he was totally unmindful of the ever changing market value of the land particularly the land with river frontage. What was agreed to in 2003 as the market value of river side property could never have been market value of the same property after seven months in 2004. The argument was that at the time when the enquiry was conducted the market value of the land even crossed Rs.1 Lakh per cent and that the steep increase in price of the land was the real reason for respondents 7 to 10 in W.P.(C) No.34130/2005 in practising all sorts of pressurization tactics so as to push out the housing Society from the land deal. What strikes me more is that the 103 members of the Society who have been alloted plots in the new housing colony who are represented by the writ petitioner in W.P.(C) No.34130/2005 are very much in favour of the scheme and their case is that the Society should be allowed to go head with the proposed land deed.

18. The 5th irregularity which is noted in the Enquiry report is

that even though a sum of Rs.2 Crores was advanced to the SCCL sale deed was executed only for land having a value of Rs. 91 Lakhs. But then on the terms of the agreement dated 7.10.2004 itself the entire transaction was to have been completed within a period of three months from 7.10.2004. The contention of the petitioner Society that but for the obstructions which cropped up in the meanwhile including the order of stay passed by the Joint Registrar upon motions by P.K.Paul and T.J.Sunny, the entire transactions would have been completed within the stipulated time does aspire some confidence.

19. The sixth irregularity which is highlighted in the enquiry report is that the Society was unable to obtain possession of 2.60 acres of land conveyed to it by the sick unit. But this finding seems to be contrary to the finding of the Division Bench of this court in W.A. No.46/2005 (document produced as Ext.P8 in W.P.(C) No.34130/2005). Ext.P8 in W.P.(C) 34130/2005 contains a finding that the Society has acquired interest over 15 acres of land and is in possession of the same. In fact Ext.P8 incorporates an interdict that pending filing of an application before AAIFR by the Society, the Society shall not effect any alteration of its rights over the aforesaid 15 acres of land. Even though a petition for review was filed against

Ext.P10 judgment, the Division Bench was not inclined to allow the review or to interfere with any of the findings or observations in Ext.P10 judgment.

20. The seventh irregularity which is highlighted in the enquiry report is the irregularity in the matter of admitting members into the society and maintenance of records. The contention of the Society is that membership has been given only to those persons who are residing or working within Ernakulam District, the area of the Society. But some of them have supplied their permanent addresses (outside the District) also in their application for membership and this is how such permanent addresses also find a place in the records. The Society points out that even though the audited balance sheets and general ledger were thoroughly scrutinised by the enquiry officer, not even a single irregularity could be pointed out regarding the accounts of the Society. The enquiry officer was not prepared even to consider the consistent case of the Society that what has been followed in the matter of receiving applications for allotment regarding the housing project in question is the previous practice in the Society, a practice which exists in most of the other societies in the State. According to

the Society, if the enquiry report which has been submitted in this case were to be treated as general guidelines regarding the manner in which new housing projects shall be taken up by housing societies, then, a large number of housing societies in the State will have to be superseded.

21. The argument which was prominently raised before me by Mr.Santhalingam was that the enquiry report had been prepared without taking into account the facts and materials actually furnished by the Society and that there has been total non-application of mind by the enquiry officer in the matter of preparing the report. I feel that the above submission of Mr.Santhalingam has some force. If that be so, the principles laid down by the Supreme court in **S.N.Chandrashekar v. State of Karnataka** [(2006) (3) SCC 208] will have to be applied and it will have to be held that the enquiry officer has misdirected himself to the extent of vitiating his report itself. It is true, as already indicated by me, that court's powers in the matter of interfering with enquiry report and for that matter in any disciplinary proceedings itself is very limited. But, at the same time, as ruled by the Supreme Court in **Narinder Mohan Arya v. United India Insurance Co. Ltd.** [(2006 (4) SCC 713):-

"Despite limited jurisdiction of the civil court, it was entitled to interfere in a case where the report of the Enquiry Officer is based on no evidence."

(see para.26 of the judgment)

"The authority considering the memorial could have justifiably come to a different conclusion having regard to the findings of the civil court. But it did not apply its mind. It could have for one reason or the other refused to take the subsequent event into consideration, but as it had a discretion in the matter, it was bound to consider the said question. It was required to show that it applied its mind to the relevant facts. It could not have without expressing its mind simply ignored the same."

(see para.32 of the judgment)

"The order of the Appellate Authority demonstrates total non-application of mind. The Appellate Authority, when the Rules required application of mind on several factors and serious contentions had been raised, was bound to assign reasons so as to enable the writ court to ascertain as to whether he had applied his mind to the relevant

factors which the statute required him to do."

(see para.36 of the judgment)

Going by the above principles of law, may be, this Court will be justified in a very rare case in interfering with an enquiry report and in directing a fresh enquiry.

22. Chapter VIII of the Kerala Co-operative Societies Rules deals with inquiry, inspection, suspension, investigation and surcharge. Rule 66 deals with the procedure for conduct of enquiry and inspection. Sub-rule (5) deals with submission of report of enquiry and the same is extracted hereunder:-

"The person authorised to conduct the inquiry or inspection shall submit his report to the Registrar on all points mentioned in the order referred to in clause (c) to sub-rule (1). The report shall invariably contain a latest balance sheet of the society and the last known addresses of the members of the Committee and of the Secretary. The report shall also contain his findings and the reason therefor; supported by such documentary or other evidence as recorded by him during the course of the inquiry or inspection. He shall also specify in his report the

costs of the inquiry or inspection together with reasons and recommend to the Registrar the manner in which the entire cost or a part thereof may be apportioned amongst the parties specified in Section 67. The Registrar shall pass such orders thereon as may be considered just after giving a reasonable opportunity of being heard to the society, person or persons concerned."

23. As already indicated, the enquiry report Ext.P14 does not advert to or discuss the objections raised by the Society. Therefore, the argument that the report was prepared in violation of Rule 66(5) of the Co-operative Societies Rules cannot be said to be without force.

24. It has been held by this Court in **Ellakkal Service Co-operative Bank v. State of Kerala** (1997 (2) KLT 85) that Rule 66 lays down a mandatory procedure. The rule specifically states that the report shall invariably contain the latest balance sheet of the society. The enquiry report in this case does not contain the balance sheet of the society. It is provided under Rule 66(2) of the Rules that a copy of every order authorising inquiry under Section 65 or inspection under Section 66 shall be issued to the President or the Secretary concerned by registered post with acknowledgement due.

The argument of Mr.Santhalingam that in the instant case no such notice was sent to the President or the Secretary of the Society by registered post was not disputed.

25. Ext.P13 order (in W.P.(C)No.29409 of 2005) of the Joint Registrar was the only order which was impugned by the Society in the Writ Petition as filed originally. By that order, surcharge proceedings as envisaged by Section 68 of the Kerala Co-operative Societies Act are initiated and the Joint Registrar has appointed an enquiry officer for submission of a report as to the extent of liability of the Directors and other functionaries of the Society to the loss sustained by the Society, which is land deal with SCCL. Obviously, Ext.P13 is issued on the basis of Ext.P14 enquiry report and a further report by the Assistant Registrar (General), Kanayannur recommending for initiation of surcharge proceedings. A careful analysis of Section 68 of the Act will show that an order under Section 68(1) directing an enquiry is contemplated only under the following circumstances:-

1) any person has made any payment contrary to the Act, Rules or bye-laws;

2) has caused any loss or damage to the assets of the society;

3) has misappropriated or fraudulently retained any money belonging to such society;

4) destroyed the records.

I do not find any specific finding in the enquiry report to the effect that the members of the Managing Committee of the Society have committed any of the aforesaid acts. As already indicated, I am impressed by the argument of Mr.Santhalingam that the land value of river-side property in Aluva has escalated considerably and therefore the question of loss being caused to the Society or its members does not arise. I find from Ext.P13 that the Joint Registrar has not considered this aspect of the matter while issuing Ext.P13.

26. This Court has held in **A.K.Francis v. Joint Registrar** (1990 (2) KLT 470) that the first requirement of Section 68 constituting a condition precedent for attracting the Section is that the facts giving rise to the charge have to be disclosed in the course of an audit under Section 63, inquiry under Seiction 65 or on the winding up of the society. Such a view was taken by this Court following the pronouncement of the Supreme Court in **Pentakota Sriramulu v. Co-operative Marketing Society** (AIR 1965 SC 621). In the same

decision it was held that the further requirement of Section 68 is that the payment or deficiency in the assets of the society was made or caused by breach of trust or wilful negligence or misappropriation or fraudulent retention of money. It is not the mere payment or deficiency that attracts Section 68, but the further fact that such payment or deficiency was made or caused by breach of trust, wilful negligence, misappropriation or fraud of the person concerned. Unless the latter ingredient, this Court held, is found to exist, action under Section 68 has to be ruled out. It is clearly held that negligence simpliciter is not sufficient to visit the officer of a co-operative society with proceedings under Section 68. The Division Bench of this Court has held that even if the enquiry officer reports that certain irregularities of serious nature exist in the working of the society, then also he is bound to independently assess the facts. Of course, the Division Bench was dealing with an order of supersession. But the same principles apply, according to me, when it comes to initiating proceedings for surcharge under Section 68.

27. I am convinced in this case that Ext.P13 in W.P.(C)No.29409 of 2005 requires reconsideration at the hands of the Joint Registrar in the light of the principles laid down by this Court in **A.K.Francis v.**

Joint Registrar (1990 (2) KLT 470) and by the Supreme Court in **Pentakota Sriramulu v. Co-operative Marketing Society** (AIR 1965 SC 621). The Joint Registrar has to hear the Society on all their objections to the enquiry report and pass fresh orders. W.P.(C) Nos.29409 and 34130 of 2005 will have to be allowed. Since those two Writ Petitions are being allowed, W.P.(C)No.31927 of 2005 is liable to be dismissed.

28. The result of the above discussion is that Ext.P13 order in W.P.(C)No.29409 of 2005 is quashed and the 3rd respondent in that Writ Petition is directed to pass fresh orders after hearing the petitioners in the Writ Petitions. Fresh orders will be passed by the 3rd respondent after considering the sufficiency and acceptability of the enquiry report Ext.P14 in W.P.(C)No.29409 of 2005 (Ext.P5 in W.P.(C) No.34130 of 2005) and if the 3rd respondent comes to be of opinion that Ext.P14 is not sufficient, he is free to direct a fresh enquiry under Section 65 before proceedings further. While taking decision as directed above, the 3rd respondent shall keep in mind the observations contained in this judgment as well as the principles of law laid down by the various judicial pronouncements which may be cited before him by the parties. W.P.(C)Nos.29409 of 2005 will stand allowed to the

above extent. W.P.(C)No.34130 of 2005 will stand disposed of and W.P.(C)No.31927 of 2005 will stand dismissed in view of the decision which has been taken in the other two Writ Petitions.

The parties will bear their respective costs.

(PIUS C. KURIAKOSE, JUDGE)

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